NO. 94-947



IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

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NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

v.

TOWN & COUNTRY ELECTRIC, INC. AND
AMERISTAFF PERSONNEL CONTRACTORS, LTD.,
*Respondents.*

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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# BRIEF FOR RESPONDENT TOWN & COUNTRY ELECTRIC, INC.

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## QUESTION PRESENTED

Whether a paid union organizer who is committed by a union's "salting" resolution to work for the union in furtherance of its organizing drive against a nonunion employer and who works for, or seeks to work for, the targeted nonunion employer, is a bona fide "employee," of the targeted nonunion employer within the meaning of § 2(3) of the National Labor Relations Act (29 U.S.C. 152(3)).

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## STATEMENT OF THE CASE

Town & Country Electric, Inc. (hereinafter "TCE"), a large nonunion electrical contractor located in Appleton, Wisconsin, has a history of hiring workers affiliated with the International Brotherhood of Electrical Workers (hereinafter "IBEW"), even though that Union has targeted TCE for unionization. J.A. 100; Tr. 298-299.[1] Approximately forty percent of TCE's workforce is made up of union-affiliated employees. J.A. 116. This is consistent with TCE's progressive management philosophy which is described in the record. J.A. 261-264.

In early September, 1989, TCE obtained a contract from Boise Cascade to perform supplemental maintenance work, on an as-needed basis, at Boise Cascade's existing International Falls, Minnesota facility. TCE, which had not previously worked in Minnesota, learned, shortly before the work was to begin, that it needed one Minnesota-licensed electrician for every two unlicensed electricians working at the Boise Cascade facility. Pet. App. 2a. Since none of its regular crew had Minnesota licenses, and it would take some time for them to become licensed, TCE needed Minnesota-licensed journeymen electricians to supplement its crew in order to perform the work initially assigned to it by Boise Cascade.

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[1] The following abbreviations are used: Joint Appendix, "J.A."; Appendix submitted with Petition for Certiorari, "Pet. App."; Petition for Certiorari, "Pet."; and Transcript, "Tr."

TCE contacted Ameristaff, an independent temporary help agency, and asked them to find the needed Minnesota-licensed electricians. Ameristaff scheduled seven interviews with job applicants at the Embassy Suites Motel in Minneapolis, Minnesota.[2] Pet. App. 3a.

When the interviewers arrived at the Embassy Suites approximately two hours late due to a flight delay, some unidentified people were waiting for them.[3] The interviewers didn't know that only one of the people waiting had a scheduled appointment. Pet. App. 3a.

The interviewers offered a job to the second person they interviewed. Pet. App. 3a. After the second interview, Steve Buelow of Ameristaff reported that the remaining applicants, who had filled out applications in the adjoining room, were not scheduled for interviews. Buelow also indicated to the interviewers that the uninvited applicants appeared to be from the Union. Pet. App. 3a. Ron Sager, TCE's manager of human resources, decided, because they were already two hours behind schedule due to a flight delay and because he was responsible for conducting the company-wide manpower meeting in

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[2] Ameristaff, on its own initiative, asked applicants if they were willing to work on a nonunion job, because of an experience its president, Steve Buelow, had with a union electrician who Buelow had tried to place, but who was unwilling to work, on a local nonunion job because of fear of union discipline. Applicant responses, if any, were not communicated to TCE. J.A. 86-90.

[3] Not all the salted organizers were present when the interviewers arrived. The salted organizers kept arriving throughout the interview process. J.A. 11.



Appleton that afternoon, [J.A. 101; Pet. App. 3a; Tr. 305-306], to interview only those applicants with appointments.[4] J.A. 101-102. When told of TCE's decision, the uninvited applicants became loud and unruly.[5] After quieting the crowd, TCE was able to confirm that only one of the applicants present had made an appointment and, accordingly, he was interviewed. That person, Malcolm Hansen, told the interviewers that he was a member of the IBEW. Nonetheless, he was hired for the Boise Cascade work. Pet. App. 4a.[6]

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[4] By that time the interviewers had already made one offer of employment to an applicant who was interested, but wanted more money. The ALJ also found that Buelow of Ameristaff intended to verify the employment references of the uninvited applicants when he returned to Appleton. Pet. App. 57a.

[5] Buelow was correct in his belief that the remaining people were from the Union. Hansen and the uninvited applicants all were present at the behest of the Union pursuant to the Union's "salting resolution." J.A. 256-257.

[6] The ALJ dismissed all independent 8(a)(1) allegations relating to the interviews at the Embassy Suites, essentially discrediting the General Counsel's witnesses. The ALJ did find that the failure to interview the unscheduled applicants was unlawful, but that finding was based on the ALJ's presumption that all nonunion employers will discriminate against someone they believe is affiliated with a union which may be interested in organizing them. The ALJ expressly admitted that he was applying that presumption. Pet. App. 62a-63a, 108a.

At the outset of his discussion of TCE's defense, the ALJ described at great length his presumption of the unlawful motivation of all nonunion employers, which was <u>not</u> based on anything representatives of TCE had said or done. The ALJ based his credi-

(continued...)

At Boise Cascade, Hansen, who was on Ameristaff's payroll, engaged in unionization activity when he was supposed to be working, despite being told that he was required to work during working time.[7] TCE's employees rebuffed Hansen's efforts and complained to their supervisor that Hansen was interfering with their work. J.A. 126-127, 145, 151-152, 166. But, Hansen persisted in his unionizing efforts. When TCE learned it would have to transfer Hansen to its payroll in order to count him towards the licensed electrician ratio requirements, TCE decided not to do so because Hansen spent so much of his time violating TCE's no solicitation rule,[8] and because, when Hansen did work, he abused

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[6](...continued)
bility findings and his rejection of TCE's defenses on that presumption. The ALJ repeatedly stated that he rejected the testimony of TCE's witnesses because, e.g., that testimony was "out of comport with economic realities," (Pet. App. 108a), or was otherwise inconsistent with the ALJ's presumption that nonunion employers are unlawfully motivated. Pet. App. 65a; 77a, fn.34; 108a; 43a, fn.1. The ALJ's presumption of unlawful intent, which was upheld by the NLRB, was also used as the basis for rejecting TCE's arguments which were inconsistent with the presumption. Pet. App. 64a-65a. Those applications of the presumption made it irrebuttable. The Eighth Circuit found it unnecessary to rule on TCE's argument that the NLRB's presumption of unlawful motive was inappropriate. Pet. App. 11a.

[7]The ALJ credited Sager's testimony (J.A. 105, 109-110) that he advised Hansen of TCE's no solicitation rule. (Pet. App. 929-949; 1099-1109 fn.73)

[8] The ALJ and the Board, relying on credibility resolutions based on the presumption of TCE's unlawful motive, described in (continued...)



TCE's tools and equipment and performed poor quality work.[9] After being released by Ameristaff, Hansen drove directly to the Union's office in Minneapolis to prepare charges for filing with the National Labor Relations Board ("NLRB" hereinafter).[10] J.A. 72.

The Union paid Hansen One Thousand Ninety-One and 82/100 Dollars ($1,091.82) for his three days' work for the Union at Boise Cascade. J.A. 259. That pay was in addition to, and substantially greater than, the Seven Hundred Twenty-Five and 15/100 Dollars ($725.15) he received from Ameristaff for that same period of time. J.A. 201. The Union's business manager testified that, pursuant to the Union's salting resolution, all salts were to be paid on the same basis. J.A. 24-25.

The Union filed charges against TCE and Ameristaff, and the NLRB issued a complaint. TCE

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[8](...continued)
footnote 6 herein, found that TCE's application of its no solicitation rule was unlawful.

[9] Contrary to the Board's assertions on page 34 of its Brief, there was extensive testimony regarding the abuse of tools and equipment by Hansen and the poor quality of his work. J.A. 127-128, 144-149, 151-156, 158-159. The only reason Hansen received a raise was that he demanded it at a time when TCE was dependent on his license to keep its crew working on the job. Pet. App. 84a-85a.

[10] The Eighth Circuit was justified in observing that Hansen returned to his full-time Union job after he was let go by Ameristaff. The Union's records show that Hansen was employed by a Union contractor before, after and during the time he was ostensibly working on TCE's crew. J.A. 281.

denied that it had committed any unfair labor practices. Pet. App. 43a.

The ALJ, with NLRB approval, largely discredited the testimony of four TCE employees regarding Hansen's poor work performance, essentially based on Hansen's denial, even though the ALJ had discredited Hansen elsewhere and had caught him lying in his explanation of his work performance.[11] Pet. App. 110a-121a.

The ALJ and the NLRB also found that TCE discriminatorily refused to interview the uninvited, unscheduled, unscreened and unruly applicants.[12] And,

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[11] The ALJ frequently found the General Counsel's principal witnesses, Hansen and Priem, unreliable. Pet. App. 54a, fn.15; 72a-74a; 86a, fn.44; 109a, fn.73. Indeed, the ALJ caught Hansen lying when Hansen supported his denial that he had ruined TCE's drill bits by claiming that he always carried a unibit with him. Hansen claimed that he had the unibit drill bit in his pocket all day during the hearing, but the ALJ's inspection revealed the metal bit was still cold, apparently from having recently been brought into the hearing room after recently being outside in the December cold, characteristic of Minneapolis. J.A. 180-181. Essentially, the only basis for the ALJ's partial crediting of Hansen was the ALJ's presumption of TCE's unlawful motivation.

[12] The ALJ acknowledged that TCE had a valid business defense for not hiring all the discriminatees. TCE only needed enough Minnesota-licensed electricians to get started on the Boise Cascade project. There is evidence in the record that two Minnesota-licensed electricians would have satisfied that need. The following week, TCE learned it could not use Ameristaff electricians to satisfy the Minnesota license requirement. All the applications were taken by Ameristaff. Because of the substantial fee it would have to pay Ameristaff for

(continued...)



they found that TCE's failure to put Hansen on its payroll was discriminatorily motivated. Pet. App. 121a, 14a. The ALJ and the NLRB further found that representatives of TCE had made several unlawful statements at the International Falls project, again, based primarily on the ALJ's presumption of TCE's discriminatory motivation. Pet. App. 13a-14a, 109a-110a.

The NLRB held that all the alleged discriminatees were "employees" of TCE within the meaning of the National Labor Relations Act, as amended (hereinafter the "NLRA"), because they were employees within the meaning of the law of agency, and that interpretation of the law of agency did not thwart congressional intent or produce absurd results.

TCE challenged all NLRB findings of unlawful conduct before the Eighth Circuit Court of Appeals. That Court decided that the NLRB had incorrectly interpreted the law of agency, and that none of the people who were the object of the alleged unfair labor practices was a bona fide employee of TCE within the meaning of the NLRA. Pet. App. 9a. Therefore, no violation of the NLRA occurred. The Eighth Circuit found it unnecessary to decide whether the NLRB improperly approved the ALJ's

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[12](...continued)
using people who had applied to Ameristaff, TCE would not have used those applications and would have independently solicited applicants. The ALJ stated that the evidence supporting that defense was "beyond suspicion." Pet. App. 57a. The ALJ left to the compliance proceeding how many alleged discriminatees were entitled to monetary redress. Pet. App. 58a-59a.

use of an irrebuttable presumption that all nonunion employers are unlawfully motivated to discriminate against individuals who are affiliated with a union, or whether the NLRB failed to follow the precedent that permits employers to prohibit solicitation during work time. Pet. App. 10a-11a. The Eighth Circuit denied enforcement of the NLRB's order. Pet. App. 11a.

## SUMMARY OF ARGUMENT

TCE allegedly violated the NLRA by conduct involving salted organizers. The NLRA only protects "employees." Thus, the allegations against TCE can only be pursued if the salted organizers are "employees" within the meaning of the NLRA.

In defining "employee" in § 2(3) of the NLRA, Congress used a circular definition which incorporated the common law of agency. The common law of agency provides that a person simultaneously may not be the agent of two masters who have conflicting interests.

The salted organizers had entered into an agreement with the Union which subjected them to Union control during the time they ostensibly were working for TCE. The salting resolution required that their sole purpose in working for TCE be to act in furtherance of the Union's organizing campaign, thereby prohibiting them from working in furtherance of TCE's interests while on TCE's payroll. The only way salted organizers could work in furtherance of TCE's interests was to resign from the Union, i.e., abandon their relationship with the Union. The Union's control over the salted organizers for a



purpose which conflicted with the interests of TCE, while they ostensibly would be working for TCE, prevented the salted organizers from being able to enter into an employment relationship with TCE in which they would be subject to TCE's control. Therefore, the salted organizers were not, and could not be, bona fide "employees" of TCE within the meaning of the NLRA.

## ARGUMENT

### A. The NLRA Only Protects Bona Fide Employees.

Section 7 of the NLRA protects the freedom of "employees" to engage, or to refrain from engaging, in concerted activity protected by the NLRA. The limited scope of § 7 was affirmed in Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992), where this Court held that the NLRB had too broadly defined the protection afforded by the NLRA when it extended that protection to union organizers who were not "employees" within the meaning of the NLRA. This Court stated:

> By its plain terms, thus, the NLRA confers rights only on employees, not on unions or their nonemployee organizers.
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> . . . .
>
> While no restriction may be placed on the employees' right to discuss self organization among themselves, . . . no such obligation is owed nonemployee organizers. As a rule, then, an employer

> cannot be compelled to allow distribution of union literature by nonemployee organizers on his property.

*Lechmere*, *supra* at pp. 532-533.

This Court has recognized that when Congress uses a circular definition of "employee," it intends to incorporate the traditional agency law meaning of "employee" into that definition. Nationwide Mutual Insurance Company v. Darden, 503 U.S. ___, 117 L. Ed. 2d 581, 588-591 (1992); *see also*, Chemical Workers v. Pittsburgh Plate Glass Company, 404 U.S. 157, 166 (1971) ("The term 'employee' is not to be stretched beyond its plain meaning . . ."); and IUOE Local 487 Health and Welfare Trust Fund (Heavy Construction Association of South Florida, Inc.), 308 N.L.R.B. 805, 805-806 (1992). The NLRB acknowledged in its decision herein, that the meaning of the term "employee" is provided by the law of agency.[13] Pet. App. 27a-28a. Thus, in order to become an employee of an employer, a person must become an "agent" of that employer, as that term is defined by the law of agency.

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[13] Though the NLRB argued at length in its Petition for a Writ of Certiorari that the NLRB's decision was consistent with the law of agency, the NLRB appears to have retreated from that position in its Brief.



## B. The Law Of Agency Requires That An Agent Be Subject To The Control Of The Agent's Master.

An agency relationship only exists if the agent is free to act in furtherance of the employer's interests and to submit to the employer's control. As stated in Restatement (Second) of Agency § 1 cmt. a. (1958), ". . . the agent must act or agree to act on the [employer's] behalf and subject to [the employer's] control."

If a person is not free to act in furtherance of the employer's interests or is not subject to the employer's control, that person is not the agent of that employer. "The agency relation results if, but only if, there is an understanding between the parties which . . . creates a fiduciary relation in which the fiduciary is subject to the directions of the one on whose account he acts. It is the element of continuous subjection to the will of the [employer] which distinguishes the agent from other fiduciaries and the agency agreement from other agreements." Restatement (Second) of Agency § 1 cmt. b. (1958).

In addition, when determining whether a servant (employee) who has been lent by one master (employer) to another has become the servant of the borrowing master (employer), the issue is who has control. The presumption is that the servant remains in the employ of the original master, even if there has been some division of control. The servant only becomes an employee of the second employer when the original employer relinquishes control. Restatement (Second) of Agency § 227 (1958).

## C. A Person May Not Simultaneously Be The Agent Of Two Masters With Conflicting Interests.

When the interests of two masters conflict, a person simultaneously cannot fulfill the obligation to serve both masters, since the control of the first master prevents the second master, with adverse interests, from exercising control over that person, and prevents that person from, in good faith, serving both masters. A person with conflicting masters must act in accordance with that person's obligations to the primary master even though that conduct is contrary to the interests of the secondary master. And, that person may not act on behalf of the secondary master in a manner which is contrary to that person's obligations to that person's primary master. In such a situation, a person may not be the agent of both masters. Restatement (Second) of Agency § 226 (1958) states:

> A person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other.

Comment a. explains:

> Since one can perform two acts at the same time, it is possible for each act to be performed in the service of a different master, although ordinarily the control which a master can properly exercise over the



> conduct of the servant would prevent simultaneous service for two independent persons. Likewise, a single act may be done to effect the purposes of two independent employers. Since, however, the relation of master and servant is dependent upon the right of the master to control the conduct of the servant in the performance of the service, giving service to two masters at the same time normally involves a breach of duty by the servant to one or both of them. . . . He may be the servant of two masters, not joint employers as to the same act, if the act is within the scope of his employment for both (*see* § 236); he cannot be a servant of two masters in doing an act as to which an intent to serve one necessarily excludes an intent to serve the other. . . . [emphasis added]

An employer has the right to expect its employee to be free to follow the employer's direction and to work in furtherance of the interests of the employer. This right of the employer to control the employee in the performance of the employee's duties for the employer[14] is the

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[14] Not being subject to the control of an employer is different from being free to be subject to an employer's control but harboring different interests from that employer. In the latter case, that person is subject to the employer's control and is able to become an "employee" of that employer, though, because of that person's interests, that person may decide to breach its obligation to submit to

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foundation upon which the above-quoted § 226 of the Restatement (Second) of Agency (1958) rests.[15]

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[14](...continued)
the employer's control. In the former case, the person has no choice and is barred by obligations to the first employer from agreeing to serve and to submit to the control of the second employer, i.e., that person cannot become an agent of the second employer and is not an "employee" of the second employer within the meaning of § 2(3) of the NLRA.

[15] These principles of agency are generally accepted. For example, 53 Am. Jur. 2d, Master and Servant, § 97 (1970), pp. 170-171, supp. p. 70, provides:

> The law implies an agreement on the part of the servant or employee to faithfully serve and be regardful of the interest of his employer during the term of his service, carefully discharge his duty to the extent reasonably required by the relation of employer and employee (citations omitted), and to treat his employer with respect. (citations omitted).

Williston on Contracts, § 1014C states:

> The duty of fidelity to his employment imposes on the employee not simply the duty of reasonably skillful performance of the work entrusted to him, but the negative duty of refraining from deception and entering into relations giving him an interest inconsistent with that of the employer.
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> . . . .
>
> [T]he employee may neither enter into business relations in competition with his employer, even though the business is so conducted by agents or

(continued...)



Thus, a person who is bound to serve and submit to the control of a master cannot become a bona fide employee of another master who has conflicting interests, and therefore, is not an "employee," within the meaning of § 2(3) of the NLRA, of that other master.

## D. The Alleged Discriminatees Were Not Employees Of TCE.

The salted organizers herein were subject to the Union's salting resolution which gave the Union exclusive control over the salted organizers while they ostensibly were working for TCE. The interests of the Union and TCE conflict. The Union's interest is to confront management at every opportunity and to create as much

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[15](...continued)
> otherwise as not to deprive the employer of the employee's attention, nor seek to acquire an indirect advantage from third persons for performing his duty to his employer.

And, in Lamdin v. Broadway Surface Advertising Corporation, 272 N.Y. 133, 138, 5 N.E.2d 66, 67 (1936), in discussing "the standard required by the law of one acting as an agent or employee of another," the New York Court of Appeals stated:

> It is an elementary principle that an agent cannot take upon himself incompatible duties, and characters, or act in a transaction where he has an adverse interest or employment. (citations omitted) In such a case he must necessarily be unfaithful to one or the other, as the duties which he owes to his respective principals are conflicting, and incapable of faithful performance by the same person. (citations omitted)

disharmony and controversy between TCE and its employees as possible to encourage employees to support the Union. TCE's interest is to have employees who diligently follow instructions, perform their work as effectively and efficiently as they can, work effectively with other employees and with people who have a business relationship with TCE, and who are free from control by a third party who doesn't have the same interests as TCE. The express purpose of the salted organizers' employment by the Union was to pursue the Union's interests. That purpose necessarily prohibited them from agreeing to serve or submit to the control of TCE. Therefore, the salted organizers could not have become bona fide agents of TCE within the meaning of the law of agency, and were not "employees," within the meaning of the NLRA with respect to TCE.

1. **The alleged discriminatees herein were subject to the Union's control while working for the targeted nonunion contractor.**

In this case, two of the salted organizers were full-time business representatives of the Union, and all of the organizers were governed by the Union's salting resolution. Pet. App. 8a-9a. Under the salting resolution, the salted organizers were only permitted to work for the nonsignatory employer if their sole purpose was furthering the Union's organizing effort. If a salted organizer accepted employment with a nonsignatory contractor for any other purpose, that salt would be in violation of the



salting resolution and would be subject to Union charges and discipline. J.A. 256-258.[16]

The salting resolution further provides that while working for the nonsignatory contractor, the salted organizers "shall promptly and diligently carry out their organizing assignments, and leave the employer or job immediately upon notification" by the Union. J.A. 256-258. Under the salting resolution, the Union has primary control over everything the salted organizers do during the course of their work day. The control of the Union over the salted organizer is pervasive and is paramount to that of the targeted nonunion contractor.[17]

The salted organizers herein were subject to the salting resolution and had lost their freedom to exercise any right under § 7 of the NLRA. The salting resolution, in effect, prohibits the salt from deciding that TCE is an excellent employer who has developed a program that is better for its employees than the Union's program; it

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[16] The relationship between the Union and its member is considered contractual in nature. See, e.g., NLRB v. Boeing Company, 412 U.S. 67, 75 (1973) and cases cited therein. Members who violate the contract are subject to court-enforceable fines and expulsion from the Union. NLRB v. International Brotherhood of Electrical Workers, Local 340, 481 U.S. 573, 576 (1987). Thus, any salted organizer who violated the "sole purpose" requirement of the salting resolution would be subject to court-enforceable fines.

[17] Apparently, the Union changed its standard salting resolution sometime after the incidents involving TCE occurred, though it still provides for Union control of the salted organizer. Any such change is not a part of the record herein and is immaterial to this case.

prohibits the salt from concluding that the employees would be better off without the Union; it prohibits the salt from speaking in favor of TCE's personnel policies; and it prohibits the salt from voting against representation by the Union in an NLRB election. In short, it prevents the salt from exercising any of the rights protected by § 7 of the NLRA.

The extent to which the Union can control the salted organizers herein is suggested by a manual on organizing titled, A Troublemaker's Handbook: How to Fight Back Where You Work–And Win!, [A Labor Notes Book, Detroit, 1991], which states at page 9:

> Organizing begins when people question authority . . . Organizing is about changing power relationships, changing the balance of forces between management and workers. Confrontation with the employer has to be built into the escalating activities.

Under this strategy, the organizing campaign permeates everything the organizer does while on TCE's payroll. Such an organizer is not free to be subject to the control of TCE. On the contrary, the salted organizer's obligation is to confront and defy efforts of TCE to exercise control over the salted organizer.

These concerns are not just theoretical. In addition to the conduct of Malcolm Hansen, there is other evidence of the extent to which the Union may exercise control over salted organizers. For example, the General Counsel of the NLRB recently reported on a case of salting in the



"General Counsel's Report" issued November 28, 1994, Daily Labor Report (BNA), No. 226, D-1, D-2, D-3 (Nov. 28, 1994). In that case, the union directed the "salts," who had been planted with a nonunion electrical contractor, to go on strike and then, one hour later, unconditionally offer to return to work, then engage in a slowdown when they came to work, including coming in late and standing around talking. When the slowdown caused the employer to fall behind schedule, the salts circulated and submitted to the employer a petition in which employees demanded a $3.00 per hour increase in pay effective immediately. When the employer refused the increase, the union told the employer it would "stop the games" if the employer would sign a bargaining agreement with the union.

Shortly thereafter, several of the employees, led by the salts, went out on strike, and then, twenty minutes later, unconditionally offered to return to work. Later that month, a "salt" demanded that the employer provide employees with health insurance and threatened that employees would strike if the employer refused. When the employer didn't accede to that demand, the employees went on strike. Two hours later, they made an unconditional offer to return to work. Shortly thereafter, the employer discovered that work materials had been hidden above ceiling tiles and behind walls, and that unknown employees had engaged in substantial miswiring. The employer claimed that the above course of conduct caused it to lose over $100,000, and forced it to go out of business.

Other examples of the type of control that may be exercised by the Union over its "salts" can be found in an article by Wharton School Professor Emeritus Herbert R. Northrup titled, "'Salting' the Contractor's Labor Force: Construction Unions Organizing with NLRB Assistance," published in the Journal of Labor Research, Vol. XIV, Number 4, Fall, 1993, pp. 475-479, referred to at greater length hereinbelow.[18]

In addition to the control imposed on the salted organizers herein by the fear of discipline for violating the salting resolution, the Union controlled the salted organizers by paying them. In NLRB v. Elias Brothers Big Boy, Inc., 327 F. 2d 421 (6th Cir. 1964), the court found that the organizer was employed by the union because she was paid $15.00 a week to cover expenses for telephone calls to employees during her organizing efforts and for gasoline to use in her car in driving employees home from work so that she could talk to them about the union. Shortly after her termination as a waitress from the employer, she became a full-time paid union organizer for the union.

The holding in the Elias case is supported by additional authorities. It has been held that the waiver of a dues obligation (McCarty Processors, Inc., 286 N.L.R.B. 703 (1987)), a free jacket (Owens-Illinois, 271 N.L.R.B. 1235 (1984)), free medical screening (Mailing Services, Inc., 293 N.L.R.B. 565 (1989)), free insurance coverage

[18] Copies of Professor Northrup's article have been lodged with the Court for its convenience.



(Wagner Electric Corporation, Chatham Division, 167 N.L.R.B. 532 (1967)), or a $5.00 gift certificate (General Cable Corp., 170 N.L.R.B. 1682 (1968)) coerces employees and can, in effect, destroy the ability of an employee to act in the capacity of a bona fide independent employee of an employer. It follows that being a paid union organizer renders a person incapable of being a bona fide employee of a nonunion employer.

A similar conclusion was reached by Member Kennedy in his dissenting opinion in Oak Apparel, Inc., 218 N.L.R.B. 701, 702 (1975):

> In my view, Mary Calligaris and Antoinette Jackson were paid professional organizers employed by the Union and were not employees of the Respondent entitled to the protection of the Act.
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> . . . .
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> In my view, the Union controlled their employment through the device of compensation and expense reimbursement arrangements, as well as a plan for obtaining backpay awards from the employees after the completion of unfair labor practice proceedings conducted by the Board. . . . In my opinion, the Union's direction of the employees' 'employment' efforts with regard to such important elements as time, place, and duration gives clear evidence of the fact that Calligaris and

> Jackson were in reality employed by the Union and not by Respondent.

*Id.* at 702.

*See also*, the ALJ's decision, on facts similar to those herein, in WACO, Inc., 316 N.L.R.B. No. 9 (1995)[19] issued December 23, 1992, **after** the NLRB issued its decision herein:

> In the instant case, under the terms of the Salting Resolution, it would have been possible for [the union's business manager] to have terminated the employment of all of the electricians, at any time, in his sole discretion. In these circumstances, where the Union retains control over the very existence of the employer-employee relationship, it would be a distortion of the Act to conclude that these individuals were 'employees' of Respondent under Section 2(3) of the Act.[8]
>
> [Fn. 8] This conclusion is consistent with NLRB precedent applying the common law 'right of control' test in defining

[19] The NLRB remanded the case to the ALJ in light of the decisions in Town & Country Electric, Inc., 309 N.L.R.B. 1250 (1992) and Sunland Construction Co., Inc., 309 N.L.R.B. 1224 (1992). The ALJ subsequently dismissed the complaint, finding no discrimination, and the Board upheld his findings.



> employee status under Section 2(3) of the Act in the following terms:
>
> > Under this test, an employer-employee relationship exists where the person for whom the services are performed reserves the right to control not only the end to be achieved but also the means to be used in reaching such end. (citations omitted)

*Id.* ALJ slip op. at p. 4.

In the instant case, the two business agents received their full salaries from the Union. The Union paid Hansen One Thousand Ninety-One and 82/100 Dollars ($1,091.82) for his three days' work for the Union at Boise Cascade. J.A. 259. That pay was in addition to, and substantially greater than, the Seven Hundred Twenty-Five and 15/100 Dollars ($725.15) Hansen received from Ameristaff for that same period of time. J.A. 201. The Union's business manager testified that, pursuant to the Union's salting resolution, all salts were to be paid on the same basis. J.A. 24-26. That means they were to receive full Union scale, plus fringe benefits, just like the salaried business agents (and, in effect, Hansen), in addition to the pay they received from the targeted nonunion employer. Clearly, the salted organizers were not dependent financially on TCE.

Under the salting resolution, the Union's control applies at all times; it is not just limited to nonworking

time.[20] The Union's control during working time over the salted organizer, Malcolm Hansen, who was successfully planted on the crew of the targeted nonsignatory contractor herein, illustrates the Union's exercise of control over "salts" while they are working for the targeted employer. Hansen spent much of his working time disrupting the work of TCE employees and talking to them about why they should be represented by the Union. Hansen aggressively persisted in his efforts to persuade TCE employees to seek representation by the Union even though he repeatedly and vehemently was rebuffed by TCE's employees. And, when he was released by Ameristaff and was not hired by TCE, Hansen immediately left the site and drove through the night so he could get to the Union's office the first thing the next morning to begin preparation of the unfair labor practice charge herein. J.A. 72.

TCE's inability to control Hansen's conduct by the threat of discipline illustrates the inability of targeted

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[20] Local 292's new salting resolution directing salts only to engage in organizing on non-work time shows that under the salting resolution in effect in this case salts were expected to engage in organizing and other activities on behalf of the Union while they were supposed to be working for the targeted employer. The change in the salting resolution is immaterial since the Union still reserves the power to control the salt at all times and, at all times, the salt remains subject to the obligation to serve the Union's interests, which conflict with those of the employer. The Union's revised salting resolution is like a lawyer claiming to suspend his or her representation of one client while attending a meeting at which the lawyer represents another client with conflicting interests to those of the first client.



nonunion employers to control salted organizers.[21] That's because the salted organizer isn't financially dependent on the nonunion employer. The salted organizer doesn't worry about being discharged by the nonunion employer — the organizer simply will return to employment with a unionized employer after providing the Union with an opportunity to file unfair labor practice charges against the targeted nonunion employer as part of the Union's campaign to inflict economic pain on that employer, a practice described by Professor Northrup in his article on salting. Journal of Labor Research, *supra.* Indeed, Hansen's work record maintained by the Union shows that Hansen was employed by a union signatory employer throughout the time he ostensibly was employed by Ameristaff on TCE's crew. J.A. 281. Indeed, discharge by the targeted employer may even be a badge of honor. Thus, the basic elements in the bona fide employment relationship that make it feasible for an employer to maintain discipline are absent with salted organizers.[22]

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[21] Asserting that an employer may effectively protect its interests through the disciplinary procedure is similar to asserting that lawyers should eliminate the rules relating to conflicts of interest because clients may sue them for malpractice.

[22] The ineffectiveness of employer discipline as a means of enforcing discipline against a salted organizer is also shown by the fact that, though TCE refused to hire Hansen because of his violation of TCE's no-solicitation rule, the NLRB held that refusal to be unlawful because the NLRB found, based on the presumption of TCE's unlawful motivation, that TCE's action was discriminatorily motivated.

In summary, salted organizers are subject to the union's control throughout the time they ostensibly are working for TCE. That control is enforced both through the compensation the organizers receive and the punishment they risk if they fail to comply with the Union's instructions. Thus, the Union has paramount control over the salted organizer throughout the time the salted organizer is on TCE's payroll.

### 2. The Union's interests conflict with those of the targeted nonsignatory contractor.

In the context of union organizing, if the interests of the union and the targeted nonunion employer are the same, it is likely that salting will be declared in violation of § 8(a)(2) of the NLRA which prohibits employers from assisting a union to become the representative of the employer's employees. *Cf.* Windsor Castle Health Care Facility, Inc., 310 N.L.R.B. 579 (1993) *enfd.* 13 F.3d 619 (2nd Cir. 1994).

Therefore, it is reasonable to assume that where the salting strategy is used, the employer is not affirmatively in favor of unionization, i.e., the interests of the union and the targeted nonsignatory employer are not the same.

An organizing union using the salting strategy and the contractor targeted by that strategy have a legitimate conflict of interest. As acknowledged by Member Oviatt in his concurring opinion in Sunland, *supra*, which was consolidated with the instant case for oral argument before the NLRB, ". . . the relationship between a nonunion employer and a union seeking to organize its employees is



usually adversarial, and sometimes quite heated." *Id.* at 1231-1232. *See also*, Labor Relations Law in the Private Sector, F. Bartosic and R. Hartley, pp. 60-61 (1986). "In administering [the NLRA], the Board and the courts seek to accommodate the legitimate, but competing, and at times conflicting, interests of the employer, the employees, the union, and the public at large. . . . The clash of competing and conflicting interests is perhaps most apparent in the context of union organizational campaigns . . ."

In the U.S. Department of Labor and Department of Commerce's "Commission on the Future of Worker-Management Relations, Fact Finding Report," Exhibit III, page 88, Joe Crump, Secretary-Treasurer of the United Food and Commercial Workers Local 951 is quoted as testifying, "Organizing is war. The objective is to convince employers to do something that they do not want to do. That means a fight. If you don't have a war mentality, your chances of success are limited."

The NLRA contemplates that an employer and a union have equal rights to compete for the support and the votes of the employer's employees. The NLRA recognizes that an employer and a union seeking to unionize its employees have conflicting interests and that law provides rules within which those adversarial interests can legitimately compete for the favor of the employees. The Union's pursuit of its interests can lead to the type of employer-damaging conduct described in the Troublemaker's Handbook, *supra*, Professor Northrup's article on salting and the case of salting in the "General Counsel's Report" of November 28, 1994.

Salted union organizers have an irreconcilable conflict of interest with TCE. A paid union organizer who is successfully planted on TCE's payroll has ample opportunity to serve the interests of the organizer's primary master, the Union, by acting adversely to the interests of TCE while masquerading as an employee of that contractor. The salted organizer can cast TCE in a bad light in the eyes of the employees by the decisions the organizer makes and the manner in which the organizer works, or doesn't work, as well as by what the organizer says and does. That is in direct conflict with an employee's obligation to TCE to apply the employee's best efforts to perform work assigned by TCE and to work in furtherance of the TCE's interests while in the TCE's service.

Because the salted organizer can conceal this conflict of interest, both the employees and the employer may be misled to believe that the organizer is acting independently, when, in fact, the organizer is merely doing what the union has paid the organizer to do. It is the corruptness of this situation which is one of the reasons the law of agency leads to the conclusion that the paid organizer cannot, in good faith, become an employee of the nonunion contractor.

Examples of on-the-job strategies available to the salted organizer for use against TCE may be found in the chapter entitled "Shop Floor Tactics" in the Trouble-maker's Handbook, *supra*, wherein it states, "successful organizing requires rank and file action, visible organizing on the shop floor in confrontation with management." *Id.* at 11. The Union has many ways to bring economic pressure short of a strike:



- **Work-to-rule** campaigns in which workers adhere exactly to company procedures or to the contract.

- **Slowdowns**, in which members reduce output to an agreed amount.

- **Making scrap**, producing products which will not pass quality control.

- **Getting lost**, a common practice of warehouse workers, maintenance crews, truck drivers and others who work in large facilities or on the streets and are not easily accessible to police. Some of these practices can get you disciplined; for example, truck drivers may be charged with 'stealing time.'

*Id.* at 16.

The salted organizer's arsenal is not limited to on-the-job-strategies. In his article entitled "'Salting' the Contractors' Labor Force: Construction Unions Organizing with NLRB Assistance," Journal of Labor Research, *supra*, Professor Herbert R. Northrup describes several cases of salting activities, primarily those of the IBEW, with which the Union involved in this case is affiliated, and the Boilermakers' Union, including strikes, slowdowns and undermining of productivity, and he concludes that the primary purpose of the salting strategy appears not to be to persuade the employer's nonunion

employees to become unionized, but, rather, to inflict or threaten sufficient economic pain on the targeted employer so that the employer signs a union contract without regard to the wishes of its employees. Professor Northrup states at page 479:

> It is quite clear from these cases that the NLRB plays a big role in the unions' salting strategy. The blunt memoranda from Michael Lucas, the IBEW salting chief, also clearly demonstrates that salters are often not interested in permanent employment. Rather, they frequently are devoted to harassment, destruction of productivity, or even in the case of a very successful open-shop builder like BE&K, elimination of the company itself unless it changes its ways and agrees to unionization.

Professor Northrup's conclusions[23] are confirmed by the case reported in the "General Counsel's Report" issued November 28, 1994, referred to in more detail

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[23] See also, Sullivan Electric Company (Administrative Law Judge's Decision), JD (NY)-04-95, Case Nos. 26-CA-16107 and 16157, 1995 NLRB Lexis 82 (Feb. 1, 1995), at p. 5, in which the ALJ concluded that the objectives of the IBEW's salting program included creating enough trouble and problems in the way of strikes, lawsuits, unfair labor practice charges and general tumult to force the nonunion contractor off the job or to make that contractor reluctant to bid in the area again.



above,[24] where massive and repeated disruptions of the contractor's operations resulted in the destruction of the contractor's business. Even if the salted organizers in that case hadn't engaged in "unprotected" activity, their "protected" activity would have resulted in serious injury to the employer's business. Inflicting serious injury to an employer's business is clearly contrary to that employer's interest. Yet, serious injury to an employer's business is one of the objectives of unions that engage in the salting strategy.[25]

The conflict of interest between a union and a targeted employer is not limited to the construction industry. If salted organizers are considered employees of the targeted employer, they may be used in any industry.

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[24] See pages 18-19.

[25] In Sullivan Electric Company, *supra*, Michael D. Lucas, the person in charge of the IBEW's salting program, testified regarding that program. Part of his evidence included a booklet titled "Salting As Protected Activity under the National Labor Relations Act", published by the IBEW. According to the ALJ, that booklet described the source of the term "salting" as follows, "We derived the term from the process of 'salting' mines in order to artificially enrich them by placing valuable minerals in some of the working places. The organizing potential in nonunion bargaining units is likewise artificially enriched by 'salting' valuable craftsmen in some of the working places." Sullivan Electric Company, *supra*, at slip op. at 3. The administrative law judge, Raymond P. Green, commented in footnote 3 of his Decision, "I wonder if the Union is aware of the irony of the salted mine analogy. Here, the employer is claiming that the Union's attempt to salt the job site by inserting members on the job, is similarly a fraudulent scheme to get people on the job who do not really intend to become employees." *Id.*

And, their use need not be limited to situations in which the targeted employer's employees are unrepresented. Salts could be used in a battle for representative status between several unions.

The control the Union has over a salted union organizer while that organizer ostensibly is working for TCE, combined with the express union objective the organizer is contractually required to pursue, prevents that organizer from being subject to the control of TCE. This conflict makes it impossible for the paid union organizer to enter into a bona fide employment relationship with TCE.[26]

The fact that a paid union organizer performs some physical tasks for a nonunion employer it is directed to organize does not change this analysis since the organizer only performs those tasks because the salt is directed to do so by the union. Clearly, if an individual performed no work at all for an employer and simply stood around handing out union literature, an employer would be justified in terminating that individual. An employer has a right to expect a full day's work for a full day's pay.

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[26] Where there are two masters with conflicting interests, the paramount master need not be the first master to enter into an agency relationship with an employee. An employee of one employer could abandon the obligation to submit to the control of the first employer, thereby ceasing to be an agent of the first employer, and agree to take on the conflicting obligation of submitting to the control of the second employer. In that case, the second employer would become the primary employer and the first employer would become the secondary employer, and the person would only be considered an "employee" with respect to the second employer.



By performing organizing activities during work time and by otherwise being obligated to give primary consideration to the Union in everything he or she says and does, a salted organizer is incapable of fulfilling his or her duty to TCE.

As the Fourth Circuit stated in its decision in H. B. Zachry v. NLRB, 886 F.2d 70, 73 (4th Cir. 1989):

> If Edwards simultaneously performs services for Zachry at his union employer's behest, he nonetheless remains in the union's employ even though he receives some remuneration from Zachry. He cannot be considered an employee of Zachry since he is performing services for Zachry only because instructed to do so by his union employer. This is not to say that an employee owes his employer some type of transcendent loyalty; rather, it is only to emphasize that the plain meaning of the term 'employee' contemplates an employee working under the direction of a single employer. The term 'plainly' does not contemplate someone working for two different employers at the same time and for the same working hours.

*Id.* at 73.

It was this same conflict which troubled the ALJ in Anthony Forest Products, 231 N.L.R.B. 976 (1977). In that case, the ALJ stated:

> I personally have great difficulty in understanding how an individual can be an employee of two different employers at the same time for the same working hours. There is a certain master-servant relationship encompassed in any employer-employee relationship which is absent under such circumstances. However, I am bound by the Board's Decision and shall find accordingly.

*Id.* at 978, n.6. Judge Harmatz, in the first Sunland case, expressed similar concerns. *See*, Sunland, *supra*, at 1246.

The distinguishing factor is that the paid Union organizer acting pursuant to a salting resolution is not free to act as he or she wishes while working for TCE, and, therefore, is not subject to TCE's control. The salted organizer is required by the organizer's paramount contractual commitments to the Union imposed by the salting resolution to give precedence to the interests of the Union to the extent those interests conflict with those of TCE. The only way the salted organizer can be free to serve TCE's interest would be to resign from the Union, i.e., abandon its relationship with the Union. It is this paramount employment relationship with the Union which the law of agency recognizes as, by definition, inconsistent with a bona fide employment relationship with TCE.



3. Bona Fide employees who are zealous union supporters without a contractual commitment to act contrary to the interests of the employer do not have a conflicting agency relationship.

The law of agency only disqualifies a person from being an agent if that person is controlled by a conflicting agency relationship. A zealous union supporter who has **not** entered into a contractual relationship with a union requiring the union supporter to work in furtherance of the union's effort to unionize the targeted nonunion employer's employees would be an "employee" of the nonunion employer within the meaning of § 2(3) of the NLRA, because the union supporter has not entered into a conflicting agency relationship. The avid union supporter is, in a legal sense, subject to the nonunion employer's control.

In the instant case, the salted organizers were not merely zealous Union supporters who, of their own free will, supported the Union. Rather, they were contractually committed to the exclusive service to the Union.

The motive of the applicant or employee is immaterial. The issue under the law of agency is whether the prospective employee is free to enter into an agency relationship with the employer, as that relationship is defined by the law of agency. The determining factor is whether the organizer simultaneously is controlled by another master with conflicting interests. If the organizer is free from that control, then the organizer is not

disqualified from being an employee of the nonunion employer.

Therefore, it is immaterial whether the targeted employer knows the salted organizer is an agent of the union[27] or if the employer has a motive that would be considered discriminatory against a salted organizer. The issue herein is like the issue in unfair labor practice cases where the object of the alleged unfair labor practice was a supervisor, managerial employee, independent contractor or a child of the business's owner. In those cases, discriminatory motive is immaterial.[28] The sole issue is

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[27] As illustrated by the examples of salting described by Professor Northrup in his article on salting, Journal of Labor Research, *supra*, salted organizers sometimes conceal their relationship with a union. Requiring an employer to know of the salted organizer's agency relationship before a person would be disqualified from becoming an agent due to a conflicting agency would not only ignore the fact that the requirements of the law of agency are not dependent on the knowledge of the master, but would encourage concealment of the conflicting relationship by deception and stealth. Moreover, it does little good for the NLRB to say that salts' right to vote can be challenged, if the employer doesn't know of the salts' relationship to the union. *See, also,* Oak Apparel, *supra*, at 706 wherein the ALJ found that the paid union organizer admitted lying in previous NLRB cases.

[28] The argument that TCE's motive is material relies on dicta, based on a questionable foundation, in cases dealing with discrimination between different types of nonemployees. And, there is no allegation that TCE's employees were unable to obtain information regarding unionization. On the contrary, they were well informed on the subject and had decided they weren't interested. The issue herein is whether the people in question are entitled to the status of

(continued...)



whether the alleged discriminatees had the protected status of "employee."[29]

Even if the zealous union supporter is a member of the union, that doesn't create a conflicting agency relation-

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[28](...continued)
"employee" with the full protection of and all the rights provided by the NLRA. Therefore, it is immaterial whether TCE was discriminatorily motivated. *See, e.g.*, NLRB v. Big Three Welding Equipment Co., 359 F.2d 77, 80, (5th Cir. 1966) (discharge of employee who was found to be a supervisor is not a violation of § 8(a)(1) or § 8(a)(3), regardless of the employer's motivation); Parker-Robb Chevrolet, Inc., 262 N.L.R.B. 402, 404 (1982), rev. den. sub. nom., Automobile Salesmen's Union v. NLRB, 711 F.2d 383 (D.C. Cir. 1983) (no violation for discharging supervisor for union activity or affiliation); Campbell-Harris Electric, Inc., 263 N.L.R.B. 1143, 1143-1144 (1983), *enfd.* 719 F. 2d 292 (8th Cir. 1983) (discharge the son of the owner because of union affiliation).

[29] It is argued that TCE didn't know that the salted organizers were seeking employment at the behest of the Union. That argument is contrary to the record and is not pertinent to the issue before the Court.

It became apparent after the second interview that there was indeed an organized Union-sponsored activity occurring. The ALJ and the NLRB found that Buelow reported to the interviewers that the uninvited applicants were from the Union. And, Hansen, who was part of the job-demanding, threatening group of people from the Union, made no secret of his affiliation with the Union. While TCE may not have known the precise terms of the relationship between the Union and the salted organizers, it was apparent that they were working together and were present at the behest of the Union. In this context, it is a remarkable statement of TCE's lack of anti-union motivation that Hansen was hired.

ship, because the general obligation of a union member does not include a specific contractual obligation to act as a salt against a targeted nonunion employer. The general rules of unions do not normally contain a specific affirmative obligation to work for the union, under the control of the business manager, in furtherance of the union's organizing drive against a targeted nonunion employer while on that targeted nonunion employer's payroll, nor do they contain any commitment on the part of the union to compensate the member for the services provided to the union by the member. Further, general union rules normally do not contain an express requirement that the member perform organizing duties promptly and diligently, nor do they contain the express right of the business manager to force the member to leave the nonunion employer as soon as the member's organizing service to the union is complete.[30] *See*, J.A. 251-253.

### a. The NLRB's Definition of "Employee" Is Not Entitled to Deference.

The NLRB's definition of "employee" is not entitled to deference because it rests on erroneous legal

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[30] Likewise, just because a striker who engages in strike misconduct is a union member doesn't make the member the agent of the union with respect to that misconduct. Union membership doesn't mean the striker was under the union's control when the misconduct occurred. The union will only be responsible for the misconduct if it can also specifically be shown that the member was acting as an agent of the union when the member engaged in the misconduct. NLRB v. Sea-Land Service, Inc., 356 F. 2d 955, 966 (1st Cir. 1966), *cert. denied* 385 U.S. 900 (1966).



foundations. *Cf.* Lechmere, *supra*; Chemical Workers v. Pittsburgh Glass, 404 U.S. 157, 166-168, 92 S.Ct. 383, 390-392 (1971). Congress has repeatedly made it clear that it intended the term "employee" to be interpreted in accordance with the law of agency unless it states otherwise. *See*, Darden, *supra*, and the cases cited therein.

The NLRB, by failing to construe "employee" consistent with the law of agency, disregarded the lessons of Darden, *supra*, and of Lechmere, *supra*.[31] Its purpose in doing so apparently was to "promot[e] the right to organize." *See*, Pet. App. 339-349, Pet. 8, Brief at p. 8. *See*, § 7, 29 U.S.C. § 157. However, the more neutral purpose of the NLRA is to "protect" the right to organize.[32]

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[31] The NLRB argues that the NLRA doesn't indicate Congress intended to exclude salted organizers from the NLRA. In fact, by excluding labor organizations, except with regard to their conventional employees, and their agents or officers from the definition of "employer" in § 2(2), and by excluding individuals employed by a person who is not an employer from the definition of "employee" in § 2(3), Congress did show it did not intend agents of the union such as salted organizers to have the status of "employee" under the NLRA.

[32] The NLRB ignores the fact § 7 of the NLRA also protects the rights of employees to refrain from engaging in organizing or other protected concerted activity.

### b. NLRB Incorrectly Assumes That the Salted Organizers Are "Employees."

The NLRB, in its extensive discussion of the definition of an "employee" in its Decision herein (Pet. App. 22a-40a), ignores the fact that all the references it cites assume that the person in question is an employee within the meaning of the law of agency. In other words, the NLRB's analysis assumes the issue, i.e., it assumes the alleged discriminatees are employees, and then looks at whether they have engaged in conduct which causes them to lose the protections of the NLRA.

The NLRB's position is that no one has so great a conflict that they are disqualified from taking on the status of agent of both masters. According to the NLRB, the only issue is whether the dual agent has engaged in conduct so egregious or has interests so patently at conflict that, even giving the agent the benefit of the protection of § 7 of the NLRA, the dual agent loses employee status with respect to one of the masters. The NLRB's analysis eliminates the distinction between employees and nonemployees and effectively ignores the provisions of Restatement (Second) of Agency § 226 (1958) which describe situations in which the simultaneous conflicting interests of two masters prevents a person from ever becoming an agent of the second master. Therefore, the NLRB has misinterpreted the statute.



### c. NLRB Ignores Conflict of Interest.

The NLRB also seeks to avert the unavoidable consequences of the law of agency by attempting to deny, by definition, that there is a conflict between the interests of the employer and the union seeking to organize the employer. Pet. App. 23a, fn.11; 33a, fn.28. That denial is ineffective because it assumes that the salted organizers are entitled to the protections of the NLRA and, because employers and unions do have conflicting legitimate interests in an organizing situation. As described above, an employer, and a union that is willing to inflict serious economic pain on that employer, do have conflicting interests.

The inappropriateness of the NLRB's failure to recognize the conflicting interests of the salted organizer becomes even more apparent when one compares "salting" to the actions of a manufacturer competing for a billion dollar contract who assigns one of its employees, who has been hired to obtain that contract as part of his job, to secure employment with the employer's chief competitor. The manufacturer then orders its employee to do everything he or she can to aid the manufacturer's quest for the billion dollar contract while working for the manufacturer's competitor.

Or, compare a law firm representing the defendant in a crucial case that assigns one of its employees who is working on the case, as part of his or her job, to obtain employment at the law firm representing the plaintiff in the lawsuit, and to do everything possible to help the

defendant win the case while working at the plaintiff's law firm.

In both of the foregoing scenarios there are conflicting duties which are to be performed simultaneously. However, it is impossible for the employee to do justice to both employers. In fact, the situations described in those examples might be characterized as spying or espionage. Yet, they are essentially the same as "salting."[33]

Indeed, compare the obverse of salting, i.e., an employer planting its employee in a union position to collect information and otherwise further the interests of the employer. That practice has been considered spying and industrial espionage. It caused a public outcry, and its abolition was considered crucial by Congress. *See*, From The Wagner Act To Taft-Hartley: A Study of National Labor Policy and Labor Relations, H. Millis and Emily

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[33] The distinction between relationships with and without inherent conflicts of interest is illustrated by the IBEW, Local 292's example, on pages 32 and 33 of its brief, of the city detective working for a restaurant while investigating the customers of the restaurant. As Professor Seavey notes, such a relationship doesn't cause an inherent conflict of interest. Assume, however, that Professor Seavey's example was changed so that the city detective was investigating the restaurant. In the latter case, there would be an inherent conflict of interest because the detective would be simultaneously pursuing the conflicting interests of the city, who was trying to convict the restaurant of a crime, and the owner of the restaurant presumably wanting to operate lawfully and not wanting to be convicted of a crime. Thus, Professor Seavey's analysis is consistent with TCE's position herein.



Clark Brown, at page 101. *See also*, Fruehauf Trailer Company, 1 N.L.R.B. 68, 73 (1935), in which the NLRB held that an employer violated the NLRA by having its employee apply for and obtain employment with the union that represented its employees.

The NLRB itself recognizes in these salting cases that, at least in some situations, there is an irreconcilable conflict of interest that prevents a paid union organizer from having a bona fide employment relationship with a targeted employer. In Sunland Construction Co., Inc., supra, at 1230-1231, a companion case to the instant case at the oral argument before the NLRB, the NLRB held that, in a strike situation, the interests of the salted organizer are sufficiently inconsistent with employment with the struck nonunion employer to be considered "inherently and unmistakably inconsistent with employment [for the nonunion employer] behind a picket line." Yet, the interests of that nonunion employer were only marginally different before the strike.

The same economic battle that is fought on the picket line is also carried on in the workplace. *See*, the discussion in The Troublemaker's Handbook: How To Fight Back Where You Work - And Win!, *supra*.

TCE's interest in preserving its business applies to on-the-job strategies with no less force than it applies to strikes. TCE's right to seek to prevail in its struggle for the support and the votes of its employees is no less significant to TCE than an employer's struggle to prevail in a strike situation. Indeed, as occurred in the case reported in the NLRB "General Counsel's Report" of

November 28, 1994, a union's organizational campaigns could result in strike-like action. The same inherent and unmistakably inconsistent interests exist in both situations. It is inappropriate for the NLRB to attempt to distinguish between those two situations, and it has inadequately explained why it has done so.

In describing the agent-of-a-striking-union exception in Sunland, the NLRB used a breach-of-obligation analysis[34] to analyze a conflicting agency relationship of the type referred to in the Restatement (Second) of Agency § 226 (1958).[35]

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[34]Incorporated in that analysis was the NLRB's erroneous assumption that everyone is entitled to the protections of § 7. Those protections significantly increase the threshold which the conflict of interest must exceed before it disqualifies the salted organizer.

[35] The conflict of interest of a salted union organizer seeking employment with the targeted nonunion employer is inherent and pervasive. It goes to the very core of the relationship and prevents the salted organizer from entering into a bona fide employment relationship with the targeted employer. This conflict of interest is distinguished from a mere breach of an obligation to an employer.

A breach of an obligation to an employer only occurs after the employment relationship exists. And, it doesn't prevent the employment relationship from coming into existence.

In the case of the salted organizers, their pervasive and inherent conflict of interest prevents them from ever becoming an agent of the targeted nonunion employer. The breach-of-obligation analysis is inapposite because the salted organizer never effectively took on any obligation to the targeted nonunion employer.



In summary, the NLRA does not protect those persons who are not capable of being "employees" as defined by the law of agency. A person may not simultaneously be the agent of two employers who have conflicting interests. Because of the control exercised by unions over salted organizers through salting resolutions and money, the salted organizers are incapable of entering into a bona fide employment relationship with a targeted nonunion employer. Therefore, the Eighth Circuit correctly held that an employer has no obligation under the NLRA to treat union agents as its employees or to afford union agents the protections of the NLRA.

### d. The Eighth Circuit's Holding Does Not Lead To Absurd Results.

It is not absurd to hold that a person may not have two masters with conflicting interests. The Eighth Circuit's decision is limited to those who enter into a relationship with the Union which prevents them from agreeing to serve the interests of a particular employer; it doesn't prevent zealous union supporters who have not submitted themselves to contractual control by the Union from becoming "employees" of nonunion employers. It does, however, preserve the integrity of the employment relationship between employers and their employees.

The Eighth Circuit's holding only applies in the narrow situation in which a person has become the agent of the Union for a purpose that conflicts with the interests of the particular employer with whom that person is seeking to become an "employee." Those people remain employees of the Union, and they are not disqualified

from being an employee of any employer other than the targeted employer.[36]

People who contractually bind themselves to the task of unionizing the employees of a nonunion employer have given up their freedom of choice with respect to the targeted employer. To give these paid agents of the union the status of employee and, through concealment, the ability to vote, is repugnant to the democratic processes that are central to the NLRA. The salts have voluntarily withdrawn themselves from the group Congress intended to protect, just as someone does who becomes a supervisor, managerial employee or independent contractor. That is a rational result consistent with the statute which preserves the democratic process on which the NLRA is based.

### e. The Eighth Circuit's Holding Does Not Thwart Congressional Intent.

Congress adopted the NLRA to protect the freedom of employees to choose whether or not they wish to be represented by a labor organization or whether or not they

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[36] The circular definitions of "employee" in other statutes will not necessarily result in salted organizers not being considered employees under those statutes. For example, the definition of "employer" under the Fair Labor Standards Act, which is used in the Family and Medical Leave Act, includes "suffer or permitting to work," which expands the definition of "employee". *See, e.g.*, Darden, *supra*. Moreover, the salted organizer would be protected by those other statutes in the organizer's employment relationship with the union, and the union would be responsible for its agent's conduct under the law of torts.



wish to engage in protected concerted activity. Salted organizers have removed themselves from that protected group by giving up their freedom to make those choices. The Eighth Circuit's decision merely recognizes that the salted organizers are no longer in the group that Congress intended to protect. On the other hand, the NLRB's analysis would eliminate the distinction between employees and nonemployees, expanding the scope of the NLRA far beyond the scope intended by Congress.

The provisions of § 302(a) of the Labor Management Relations Act (29 U.S.C. § 186(a)) are consistent with the Eighth Circuit's holding. Section 302(a) merely recognizes that there may be situations in which a person could work both for a union and for an employer without being an agent serving masters with conflicting interests. That would normally be the situation where union stewards and other officials are expressly recognized in the collective bargaining agreement and are authorized to engage in their union activity. Section 302 does not purport to state that every employee of a union is also an employee of the employer, any more than it converts a child of the owner of an employer, or a working supervisor of a unionized contractor, who is also a paid union official into an "employee." Section 302 does not purport to change the definition of "employee." It only recognizes that there are situations in which a person could be an agent of both a union and an employer consistent with the law of agency.

On the other hand, a finding that salted organizers were "employees" effectively eliminates the distinction between employees and nonemployees and would transfer

significant power to the union in its competition with employers and tip the balance in favor of the union. In view of Professor Northrup's findings that salting strategies seem to be used to inflict sufficient pain on the employer to force the employer to enter into a union agreement or go out of business, without regard to the wishes of the employees, it is the employees of the targeted employers who are the ultimate losers in the salting strategy, contrary to the purpose of Congress to protect the right of choice of those employees.[37]

## CONCLUSION

This case is similar to the Darden case, *supra*, in which this Court was asked to determine whether a circular definition of "employee" in ERISA should be interpreted in accordance with the law of agency or be expansively interpreted by the Court in light of the mischief to be corrected. This Court recognized that, on several occasions, when this Court approved a definition of employee that went beyond the common law, Congress amended the statute to demonstrate that it wanted the common law of agency definition to apply. In Darden, the Court recognized that Congress intends a common law definition of "employee" to apply unless it clearly states otherwise, and that concern about the mischief to be corrected should be left primarily to Congress.

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[37] The Boilermakers' Union in footnote 1 (page 3) of their Brief note that their effort to force Sunland Construction Co., into signing collective bargaining agreements without a representation election was successful.



The NLRA's use of a circular definition of "employee" confirms that Congress intended the common law definition to apply. The common law provides that a person may not be the servant of two masters if service to the one requires abandonment of service to the other.

In this case, the salting resolution prohibits salted organizers from having any purpose in working for the targeted employer other than acting in furtherance of the Union's organizing campaign. The only way the salted organizer could agree to serve the employer's interests is if the organizer resigned from the Union, i.e., abandoned the Union's service. Since the salted organizers were committed to the Union, they were not free to become agents of the targeted nonunion employer. Therefore, they were not "employees" within the meaning of the NLRA with respect to that employer.

As in the Darden case, *supra*, the government asks the Court to ignore the law of agency and expand the definition of "employee" to include everyone who isn't expressly excluded by § 2(3) of the NLRA. In effect, the NLRB is asking this Court to ignore the lessons of the Darden case. TCE asks the Court to heed those lessons and to uphold the Eighth Circuit's decision.

Respectfully submitted.
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